Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 05-294
PETITION FOR FORBEARANCE	)	
From Enforcement of the Commission's	)	
Circuit-Conversion Rules As They Apply To	)	
Post-Merger Verizon/MCI and SBC/AT&T	)	
	)	
(Petition for Forbearance Under 47 U.S.C. § 160 (c))	)	

OPPOSITION OF
INTEGRA TELECOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
MPOWER COMMUNICATIONS CORP.
ONEEIGHTY COMMUNICATIONS, INC.
PAC-WEST TELECOMM, INC.

Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., OneEighty Communications, Inc., and Pac-West Telecomm, Inc. (collectively "CLEC Commenters") by their undersigned counsel, submit this opposition to the above-referenced Petition for Forbearance from the Commission's Circuit-Conversion rules filed by Qwest Communications International Inc.'s ("Qwest").[1] Although Qwest ostensibly limits its Petition solely to ILEC obligation's to convert special access circuits to UNEs when the conversion request is made by one of the new merger-created "MegaBOCs," CLEC Commenters oppose the Petition because the arguments that Qwest advances in support of the Petition are the same invalid arguments that Qwest and its MegaBOC cousins have traditionally employed to thwart in-region facilities-based competition, attempt to continue to earn monopoly profits, and discriminate against CLEC competitors.

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[1] *See e.g.,* 47 C.F.R §§ 51.316 – 51.319.

I. QWEST'S CONCERNS ARE ILLUSORY

In its petition, Qwest asks the Commission to "relieve Qwest and other ILECs of the duty to convert post-merger Verizon/MCI and SBC/AT&T special access circuits to UNE pricing..."[2] Qwest is concerned that, post-merger, Verizon/MCI and SBC/AT&T will "marry their market dominance with the unfettered ability to convert special access circuits to UNEs," which would, in Qwest's opinion, curtail competition, harm consumer welfare and result in the ability and incentive of the merged companies to engage in tacit collusion.[3]

The Commission established the initial special access conversion rules in the 2000 *Supplemental Order Clarification*[4] and then refined them in the 2003 *Triennial Review Order.*[5] BOCs have been concerned, even under these standards, that IXCs, especially AT&T and MCI, would engage in wholesale conversions of special access circuits to UNE status. However, this never happened. Moreover, Qwest has advanced no reason as to why the fact that AT&T and MCI have been, acquired by other BOCs creates any greater risk of this occurring in the Qwest region. Presumably, if AT&T and MCI had been able to convert their special access circuits obtained from Qwest to UNEs under the current rules, they would have done so long ago.

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2 *See* Qwest Communications International Inc., Petition for Forbearance From Enforcement Of The Commission's Circuit Conversion Rules As They Apply to Post-Merger Verizon/MCI and SBC/AT&T, WC Docket No. 05-294, at 2-3 (filed Oct.4, 2005) ("*Qwest Forbearance Petition*").

3 *See id.* at 3 – 5.

4 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

5 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*TRO*").

7 Selwyn Declaration, WC Docket No. 05-65. para. 30.

Furthermore, the so-called risk of special access conversion by IXCs has been significantly attenuated because the BOCs have gained very substantial in-region market shares for long distance service.[7]

For these reasons, the Petition presents no basis for a conclusion that current restrictions present any substantial risk of conversion of combinations of network elements from special access to UNEs by the BOCs out-of-region or by anyone else. Consequently, there is no basis to any of the other alleged harms deriving from these conversions. Indeed, the only risk of collusion is that Qwest and other BOCs will agree to mute out-of-region competition in general and agree to pay each other's inflated special access charges.

II. EEL RESTRICTIONS ARE TOO RESTRICTIVE

Whatever the merit of preventing IXCs from using EELs to provide voice service, they are too restrictive and bureaucratic in that they hinder CLECs' ability to provide local data services as well, as explained to the Commission in pending petitions for reconsideration of the *Triennial Review Remand Order*.[8] In addition, the EEL "architectural" standards are of questionable utility at best in an IP-enabled environment. Those standards impose a number of bureaucratic restrictions, such as trunk ratios, that likely are irrelevant in an IP-enabled environment. BOCs, of course, would be the first to complain about the Commission imposing network architecture requirements on them, but they have no problem with imposing these artificial restrictions on CLECs, especially since they provide the added benefit to RBOCs of hindering CLEC participation in the IP-enabled marketplace.

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8 Petition for Reconsideration filed by CTC Communications Corp. et al, WC Docket No. 04-313, filed March 29, 2005, p. 8.

10 *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 19 FCC Rcd 16783, at ¶ 31, FCC 04-179 (rel. Feb. 4, 2005) ("*TRRO*" or "*Triennial Review Remand Order*").

Accordingly, there is no basis for continuing to apply EEL restrictions to CLECs, even assuming there were any merit to applying them to out-of-region BOC operations.

III. CURRENT RESTRICTIONS ARE UNLAWFUL

A further reason for denying the Petition is that the Commission's prohibition in the *Triennial Review Remand Order* on use of UNEs exclusively for long distance service is very likely unlawful. In *USTA II*, the Court correctly found that UNEs may be used for any telecommunications service and that the statute requires the Commission to subject all telecommunications services to an unbundling analysis.[10] However, in the *Triennial Review Remand Order* the Commission dispensed with any impairment analysis for long distance service and simply prohibited use of UNEs exclusively for long distance service based on a cost/benefit analysis.[11] While *USTA II* states that it expected the Commission to find that CLECs were not impaired for long distance service, this did not authorize the Commission to dispense with an impairment analysis entirely. In addition, although *USTA II* approved the Commission's use of "at a minimum" in the context of establishing broadband relief, in that case the Commission considered impairment in addition to its broadband goals.

In effect, the Commission in the *Triennial Review Remand Order* simply reestablished the previous and now unlawful qualifying services standard by a new unlawful means. Accordingly, the EEL restrictions are unlawful because the prohibition on long distance service that the Commission uses to justify the restrictions is also unlawful. Since the prohibition on use of EELs for long distance service is *per se* unlawful, there is no basis for permitting Qwest to preclude any conversions whatsoever as requested in its Petition.

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[11] *Triennial Review Remand Order*, para. 36.

IV. SPECIAL ACCESS IS NOT A SUBSTITUTE FOR UNEs

A. The *TRRO* Refutes Qwest's Arguments

In the Petition, Qwest asserts that a no conversion policy is acceptable because special access can be a viable substitute for UNEs. Qwest states that the Commission's rules allow CLECs the benefit of UNE rates even when they already provide service using special access facilities, which according to Qwest, plainly demonstrates that CLECs can provide service using leased special access circuits.[12]

The Commission has already considered and rejected Qwest's arguments.[13] In response to the *USTA II* ruling and arguments raised by various ILECs, the Commission has considered the appropriate role of tariffed ILEC services in its unbundling framework.[14] The Commission has explicitly determined that in the local exchange market, the availability of a tariffed alternative *should not foreclose unbundled access* to a corresponding network element, even where a carrier could, in theory, use that tariffed offering to enter a market. Moreover, the Commission ruled that:

> ... a bar on UNE access wherever competitors could operate using special access would be inconsistent with the Act's text and its interpretation by various courts, would be impracticable, and would create a significant risk of abuse by incumbent LECs. It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs. Finally, we find that a competitor's current use of special access in the local exchange market does not conclusively demonstrate non-impairment.[15]

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12 *Id.* at 24.

13 *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, at ¶ 48 (2005)("*TRRO Remand Order*").

14 *Id.* at ¶¶ 46 – 48.

15 *Id.* at ¶ 48.

B. UNE Obligations Are Not Temporary

Qwest also claims that special access is a substitute for UNEs because "[p]ermitting emerging competitors to obtain UNEs was intended as a *temporary* measure to take into account the practical realities that not all new carriers would possess sufficient customer bases to justify building out competing facilities immediately..."[16] Such an assertion is flat-out wrong. Congress, recognizing the unfair competitive landscape, passed the 1996 Act to foster long-term competition, stability, and growth in the telecommunications market for both consumers and telecommunications carriers. There were no "quick fixes" and none of the UNE provisions of the Act, the corresponding legislative history, or subsequent Commission rules and regulations have indicated that any such UNE provisions were meant to be temporary. Furthermore, Congress was well aware of the availability of special access prior to the 1996 Act and therefore accounted for the availability of such facilities when it drafted the impairment, unbundling, and pricing provisions of the 1996 Act. It is plainly clear that Congress intentionally excluded the availability of special access from these provisions of the 1996 Act.

Qwest's concept that CLECs can provide service using special access circuits instead of UNEs also misses the point of the 1996 Act. Congress' intent of the 1996 Act was not just to draw competitors into the market; the 1996 Act was also designed to promote competition "in order to secure lower prices and higher quality services for American telecommunications consumers."[17] If CLECs could enter the market only by purchasing special access, and did not have other viable alternatives, then ILEC and CLEC retail rates would remain inflated to the

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16 *Qwest Forbearance Petition* at 23.

17 Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, codified at 47 U.S.C. §§ 151 *et. seq.*

extent that special access exceeded costs. CLECs would be unable and ILECs unwilling, to decrease retail rates to assure Congress' ultimate objective of lower prices for consumers.

C. Special Access Is Not a Valid Substitute For UNEs Because It Does Not Adequately Protect Against A Price Squeeze

Under current rules, ILECs enjoy pricing flexibility for special access in many metropolitan areas (MSAs). In these markets in particular, rates for special access have generally increased over the years to amounts unreasonably in excess of cost.[18] The Commission has recognized that "in recent years, incumbent LECs operating under price caps have enjoyed historically high rates of return.."[19]

Although the Commission has the legal authority to prevent price squeezes and discriminatory pricing, one of the purposes of the Act was to create self-executing market pressures from UNE-based competition that would reduce the need for active policing by the Commission. Moreover, the Commission in recent years has not demonstrated an appetite to engage in the level of market supervision that would be necessary to protect consumers if competition were left to rely on special access, such as the risk of a price squeeze and discrimination. *USTA II* asked the Commission to assess the risks associated with reliance on special access.[20] The potential for a price squeezing and discriminatory pricing, especially in

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18 *See, e.g.*, Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (filed August 26, 2004) (attaching white paper entitled "Competition in Access Markets: A Reality or Illusion."), at 27-40. ("*Ad Hoc Users Report*").

19 Verizon Petition for Emergency Declaratory and Other Relief, WC Docket 02-202, Policy Statement, FCC 02-337, 17 FCC Rcd 26884, at ¶ 18 (2002). Interstate rates-of-return in 2003 for BellSouth, Qwest, SBC, and Verizon (former Bell Atlantic and NYNEX) were 21.93%, 23.03%, 15.60%-26.23%, and 7.99%, respectively. Trends in Telephone Service, Industry Analysis and Technology Division, Wireline Competition Bureau, Tables Compiled as of April 2005.

20 *United States Telecom Association v. FCC,* 359 F.3d 554, 577 (D.C. Cir 2004) ("*USTA II*").

MSAs that have qualified for pricing flexibility, is an obvious risk that by itself requires the Commission to conclude that special access is not a viable alternative to UNEs.

D. Special Access Prices, Terms And Conditions Are Unreasonable.

Qwest also claims that special access is a substitute for UNEs because its and its BOC cousins' rates for special access services are just and reasonable.[21] However, the Commission certainly cannot accept this declaration in light of the substantial warning signals on the record of its ongoing review of special access pricing and terms and conditions.[22] As noted, special access prices remain far above forward-looking economic costs. BOCs' extraordinarily high rates-of-return demonstrate that the Commission's regulatory framework governing special access pricing is not producing reasonable rates. As of the year ended 2004, the RBOCs' special access rates of return were as follows: Verizon – 31.6%, SBC – 76.2%, Qwest – 76.8% and BellSouth – 81.2%.[23] Overall, the RBOCs averaged an incredible 53.7 percent rate-of-return.[24]

The record before the Commission already demonstrates that these returns are not short term phenomena or aberrations resulting from one-time change in circumstance. Indeed, since the passage of the Telecommunications Act of 1996 to the present, the average special access category earnings have steadily increased from 8.25 percent in 1996 to a remarkable 43.7 percent at the end of 2004 and jumped to 53.7 percent at the end of 2004.[25] BOCs are overcharging

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21 *See Qwest Forbearance Petition* at 33.

22 *Special Access Rates for Price Cap Local Exchange Carriers,* Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access Proceeding*)

23 Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-65, at ¶ 9 (attaching "Reply Declaration of Susan M. Gately") (filed May10, 2005).

24 WC Docket 05-65, Reply Declaration of Susan M. Gately, at ¶ 9 (May 10, 2005).

25 WC Docket 05-65, Reply Declaration of Susan M. Gately ¶ 9 (May 10, 2005); ETI White Paper at 28-29; *see also Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for*

special access ratepayers $15 million per day in comparison to what they would be charging if they were earning an 11.25% rate-of-return.[26] During 2004, the RBOCs' excessive overcharges went up 15 percent - the RBOCs' overcharges yielded a whopping $6.4 billion in excessive special access revenues or $17.5 million per day.[27] Moreover, there is substantial information in the record of the *Special Access Proceeding* that BOCs, including Qwest, impose anticompetitive non-pricing terms and conditions.[28]

The United States Supreme Court and lower district courts have consistently held that where "[special access] returns have greatly exceeded a fair percentage of return upon a fair base, it follows as a matter of law that the rates charged . . ., instead of being 'just and reasonable' ...[are] excessive."[29] Further, the Commission made clear when the price cap regime was implemented, that observed returns remain the litmus test for determining whether the specific price cap rules are working to protect consumers from unjust and unreasonable rates or if the rules need to be overhauled. Therefore, there is no basis for the Commission to conclude that the Petition may be granted because special access prices and other terms and conditions are reasonable.

Interstate Special Access Services, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, at ¶ 35, FCC05-18 (rel. Jan. 31, 2005) (noting that over the last seven years (1998-2003), the RBOCs' collective special access rates have been 18, 23, 28, 38, 40, and 44 percent, respectively).

26 Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, Sec'y, Federal Communications Commission, RM-10593, Att. (Economics and Technology, Inc., Competition in Access Markets: Reality or Illusion – A Proposal for Regulating Uncertain Markets) (filed Aug.26, 2004)("*ETI White Paper*"), at 7-8 Table 1.1; WC Docket 05-65, Reply Declaration of Susan M. Gately, at ¶ 6 (May 10, 2005).

27 WC Docket 05-65, Reply Declaration of Susan M. Gately, at ¶ 6 (May 10, 2005).

28 Reply Comments of WilTel Communications, LLC, WC Docket No. 05-25, July 29, 2005, p. 26.

29 *Potomac Elec. Power Co. v. Public Utils. Comm'n of the District of Columbia*, 158 F.2d 521, 523 (D.C. Cir. 1947) (quoting *Dayton-Goose Creek Co. v. United States*, 263 U.S. 456, 483 (1924) (emphasis added).

IV. CONCLUSION

For the forgoing reasons, the CLEC Commenters respectfully request that the Commission deny Qwest's Petition.

Respectfully submitted,

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